PUBLIC PROSECUTOR

v.

PARAM CUMARASWAMY

HIGH COURT MALAYA, KUALA LUMPUR
NH CHAN J
[FT CRIMINAL TRIAL NO. 39 OF 1985]
3 & 25 JANUARY 1986

CRIMINAL LAW AND PROCEDURE: *Sedition - Open appeal by way of newspaper statement to Pardons Board - Section 3(1), (2) of Sedition Act 1948 - Whether likely to create disaffection against Ruler - Whether likely to create disaffection or discontent amongst inhabitants of Malaysia or classes of the people - Ill-will and hostility.*

CONSTITUTIONAL LAW: *Freedom of speech - Articles 10(1)(a), 10(2) of Federal Constitution - Line between free speech and sedition.*

Mr. Cumaraswamy was charged for having uttered seditious words at a press conference called by him on behalf of the Bar Council on the 24 July 1985 at the office of the Selangor and Federal Territory Bar Committee, Old High Court Building, Kuala Lumpur. The full text of the statement made by him is reproduced in the judgment. At the press conference where many reporters were present, Mr. Cumaraswamy first read out the statement to them after which he distributed copies of the statement to all of them. The local press carried the story the next morning. He was charged by the Public Prosecutor under s. 4(1)(b) of the Sedition Act, which carries a penalty of a fine of RM5,000 or to an imprisonment term not exceeding 3 years or both. The Prosecution relied on s. 3(1)(a), (d) & (e) of the Sedition Act to say that that the statement was seditious, to wit, that the statement had a tendency

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

(b) to raise discontent or disaffection amongst subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State; or

(c) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia.

Held:

[1] In this country, just as in every country, there cannot be absolute freedom when we speak of fundamental rights (or human rights). In all common law countries, whether we have the Dicey Rule of Law or a Bill of Rights or a written constitution, freedom is not an absolute right but is actually freedom under the law.

[2] The Court must look for the ingredients of the offence from the codified law and not import principles which have been established by English case law and that, accordingly they cannot be imported into the offence (as created under the codified law) the additional ingredient of incitement to violence or inciting others to public disorder. *(Wallace-Johnson v. The King* [1940] AC 231, 240).

[3] The line between criticism and sedition is drawn by a Judge who is independent of the party in power in the State. If Judges are to receive the confidence of the people they must be independent of the Executive. In this present case, the line between what is seditious

and what is not seditious is drawn by a Judge. If the Judges are independent as in this country, there is nothing to fear - the rule of law is preserved. It is then the province of the Judge to hold the balance between the competing interests.

[4] Under s. 3(1)(d) of the Sedition Act, the words uttered must have a tendency to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State.

[5] The statement concerned did not have the tendency to incite or to raise disaffection among the people and did not contain words which were capable of advocating or encouraging the people to disloyalty. There was no tendency in the words to create antagonism, enmity and disloyalty among the people.

[6] The words which were used to point out to the Pardons Board that the people should not be made to feel that the Board was discriminating between Mokhtar Hashim and Sim Kie Chon were not words which were likely to create discontent or disaffection among the people.

[7] After taking into consideration all the circumstances of the case, the statement did not have the tendency to promote ill-will and hostility between the different classes of the people as is stated in s. 3(1)(e) of the Sedition Act. In fact, Mr. Cumaraswamy was urging the Pardons Board not to create the feeling among the population that the Board was discriminating between the different classes.

[8] Mr. Cumaraswamy's appeal was directed at the Pardons Board, not at the Ruler which in the instant case is the Yang di-Pertuan Agong. Therefore, there can be no question of the statement having a tendency to bring into hatred or contempt or to excite disaffection against the Yang di-Pertuan Agong as is alleged by the Prosecution under paragraph (a) of s. 3(1) of the Sedition Act.

[9] The Yang di-Pertuan Agong, when exercising the power to grant pardons, reprieves and respites or to remit, suspend or to commute sentences, is bound by the advice of the Pardons Board and the Board is therefore subject to the supervisory jurisdiction of the Courts.

[Acquittal and discharge ordered.]

Cases referred to:
Haw Tua Tau v. PP [1981] CLJ (Rep) 11
Reg. v. Burns [1886] 16 Cox CC 355
Wallace-Johnson v. The King [1940] AC 231
Reg. v. Sullivan [1868] 11 Cox CC 44
Rex v. Burdett [1820] 4 B & Ald 95
Rex v. Aldred [1909] 22 Cox CC 1
Emperor v. Sadashiv [1947] AIR PC 82
Assa Singh v. Mentri Besar, Johore [1969] 2 MLJ 30
Kedar Nath v. State of Bihar [1962] AIR SC 955
Ramji Lal Modi v. State of UP [1957] SCR 860; [1957] AIR SC 620
John Miller [1770] 20 State Trials 869
Burns v. Ransley [1949] 79 CLR 101
Maru Ram v. Union of India [1980] AIR SC 2147
Tonkin v. Brand [1960] WA Rep 535
FAI Insurance Ltd. v. Winneke [1982] 56 ALJR 388
Teh Cheng Poh v. PP [1970] 1 MLJ 50
OSK v. Tengku Noone [1983] CLJ (Rep) 317

Legislation referred to:
Criminal Code of Gold Coast, s. 326(8)
Essential (Security Cases) (Amendment) Regulations 1975, reg. 29(1)
Essential (Security Cases) (Amendment) Regulations 1981, reg. 2
Federal Constitution, arts. 10, (2)(a), 4(2)(b), 42(1), (2), 162(1)
Constitution of India [Ind], arts. 19(1)(a), (2)
Penal Code [Ind], ss. 124A, 295(A)
Sedition Act 1948, ss. 3(1), (2), (1)(a), (d), (e), 4(1)(b)

Other sources referred to:
Phipson on Evidence, 13th Edn., p. 48, para. 4 - 10
Digest of Criminal Law 3rd Edn, Article 91 & 93, 4th Edn. Article 94
Freedom, The Individual and the Law, Professor Harry Street, 5th Edn., p. 4
Freedoms under the Law (the Hamlyn Lectures, first series), Lord Denning, p. 4
Family Story, pp. 177-8, 191, 192

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1ST JUDGMENT

NH Chan J:

The charge against Mr. Param Cumaraswamy is:

> That you on 24 July 1985 at about 11.00 a.m. at the office of the Selangor and Federal Territory Bar Committee in the old High Court Building, in the Federal Territory of Kuala Lumpur, uttered seditious words to wit, that part of your press statement as underlined, (the full text of which is attached as Schedule "A" to this charge) and that you have thereby committed an offence under s. 4(1)(b) of the Sedition Act, 1948 (Revised 1969) and punishable under s. 4(1) of the said Act.

At the close of the prosecution's case, Counsel for the defence submitted that there is no case to answer.

All that is required at the close of the prosecution's case is for the prosecution to discharge their evidential burden by adducing sufficient evidence to raise a *prima facie* case against the accused. "The prosecution makes out a case against the accused by adducing evidence of primary facts." - said Lord Diplock in *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11. At that stage, a trial Judge should not consider whether or not a case has been proved beyond a reasonable doubt against the accused. If no evidence is called for the defence then, and then only, the tribunal of fact must decide whether the prosecution has succeeded in discharging its persuasive burden by proving its case beyond a reasonable doubt: see *Phipson on Evidence* (13th Edn.) p. 48 para. 4-10.

It is with this attitude of mind that I now proceed to consider the case on the defence submission of no case to answer.

Sir James Stephen's definition

In the Digest of the Criminal Law, Sir James Stephen said this on seditious words (*Digest*, (3rd Edn.), Article 91):

> Every one commits a misdemeanour who publishes verbally or otherwise in words of any document with a seditious intention.

It is then important to know what is meant by the words seditious intention. Stephen defined it as (*Digest* (3rd Edn.), Article 93):

> A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs, or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite. Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst Her Majesty's subject, or to promote feelings of ill-will and hostility between different classes of such subjects.

"Stephen J is a Judge of very great accuracy," said Cave J in *Reg. v. Burns* [1886] 16 Cox CC 355, "and for every proposition there laid down there is to be found undoubted authority. He goes on to point out what sort of intention is not seditious." Article 93 of the *Digest* (3rd Edn.) reads:

> An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects, is not a seditious intention.

This definition of what is and what is not sedition was approved by the criminal code Commissioners:

> "The law upon the question of what is seditious and what is not is to be found stated very clearly in a book by a learned Judge, my brother Stephen, who has undoubtedly a greater knowledge of the criminal law than any other Judge who sits upon the bench, and what he has said upon the subject of sedition was submitted to the other learned Judges, who some time back were engaged with him in drafting a criminal code, and upon their report the commissioners say that his statement of the law appears to them to be stated accurately as it exists at present. So that that statement has not only the authority of Stephen J., but also the authority of the very learned Judges who were associated with him in preparing the criminal code."

- per Cave J in *Burns*, at p. 359. and quoted with approval by Cave J in his summing up to the jury in *Burns.*

Stephen's definition found its way into the Criminal Code of the Gold Coast. Section 326 subsection 8 of the Criminal Code of the Gold Coast, 1936 Revision, c. 9, provides:

> Sect. 326 sub-sect. 8. A 'seditious intention' is an intention-
>
> (1) to bring into hatred or contempt or to excite disaffection against the person of His Majesty, His heirs or successors or the Government of the Gold Coast as by law established; or

(2) to bring about a change in the sovereignty of the Gold Coast; or

(3) to excite His Majesty's subjects or inhabitants of the Gold Coast to attempt to procure the alteration, otherwise than by lawful means, of any other matter in the Gold Coast as by law established; or

(4) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Gold Coast; or

(5) to raise discontent or disaffection amongst His Majesty's subjects or inhabitants of the Gold Coast; or

(6) to promote feelings of ill-will and hostility between different classes of the population of the Gold Coast:

It is not a seditious intention-

(a) to show that His Majesty has been misled or mistaken in any of his measures; or

(b) to point out errors or defects in the Government or constitution of the Gold Coast as by law established or in legislation or in the administration of justice with a view to the reformation of such errors or defects; or

(c) to persuade His Majesty's subjects or inhabitants of the Gold Coast to attempt to procure by lawful means the alteration of any matter in the Gold Coast as by law established other than that referred to in para. (2) of this sub-section; or

(d) to point out with a view to their removal any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of the Gold Coast:

Provided that none of the acts or things mentioned in provisos (a), (b), (c) and (d) shall be deemed to be lawful if they are done in such manner as to effect or be likely to effect any of the purposes (1) to (6) which are declared in this section to be a seditious intention.

'Seditious words' are words expressive of a seditious 'intention'."

We can see at once the unmistakable resemblance with Stephen's definition. With the exception of the proviso, which I have for the sake of clarity underlined, subsection 8 is virtually a copy of Stephen's definition of what is and what is not sedition. As was said by Viscount Caldecote LC in *Wallace-Johnson v. The King* [1940] AC 231, 240, "There is a close correspondence at some points between the terms of the section in the Code and the statement of the English law of sedition by Stephen J in the *Digest of Criminal Law* quoted with approval by Cave J in his summing up on *Reg. v. Burns and Others* [1886] 16 Cox CC 355."

In *Wallace-Johnson* an attempt was made to attach a further qualification to the definition as stated by Stephen and which was embodied in the Criminal Code of the Gold Coast. There it was argued on behalf of the appellant that not only must the words be expressive of an intention to achieve one or more of the objects specified, they must themselves be of such a nature as to be likely to incite to violence. Counsel for the appellant referred to the following English authorities: *Reg. v. Sullivan* [1868] 11 Cox CC 44; *Rex v. Burdett* [1820] 4 B & Ald 95, where it was stated, at p. 131, that to be a seditious libel it must be "calculated to incite them to acts of violence and outrage."; *Rex v. Aldred* [1909] 22 Cox CC 1, where Coleridge J, in summing up, said, "The word 'sedition' in its ordinary natural signification denotes a tumult, an insurrection, a popular commotion, or an uproar; it implies violence or lawlessness in some form."

But there was no such qualification in Stephen's definition, and Stephen's definition was imported into the Criminal Code of the Gold Coast Colony. This is what Viscount Caldecote LC, in giving the judgment of the Privy Council, said in *Wallace-Johnson,* at p. 239:

> The present case, however, arose in the Gold Coast Colony, and the law applicable is contained in the Criminal Code of the Colony.

Add at p. 240:

> The fact remains, however, that it is the Criminal Code of the Gold Coast Colony, and not in English or Scottish cases, that the law of sedition for the Colony is to be found.

At pp. 240, 241:

> Nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result, and their Lordships are unable to import words into [s. 326] which would be necessary to support the appellant's argument.

It is to be noted that in *R. v. Aldred* [1909] 22 Cox CC1, Coleridge J (at p. 4) also required language calculated to incite others to

> **public disorders,** to wit, rebellions, insurrections, assassinations, outrages, or any physical force or violence of any kind." (emphasis supplied)

Although it may appear to be the position in English case law that incitement to violence or inciting others to public disorders is an essential ingredient of sedition, it is not so in a criminal code which has as its model Stephen's definition. "In England there is no statutory definition of sedition; its meaning and content have been laid down in many decisions, ... but these decisions are not relevant when you have a statutory definition of that which is termed sedition, as we have in the present case." - said Lord Thankerton in the Privy Council case of *Emperor v. Sadashiv* [1947] AIR PC 82.

Seditious intention

In both the Stephen and the Criminal Code of the Gold Coast definitions an intention to achieve one or more of the objects specified in the definition is an essential ingredient of the crime of sedition. The important question is whether the "intention" must be proved. In Article 94 of the Digest (4th Edn.) Stephen put it thus:

> In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.

Stephen's view did not require any more *mens rea* than an intention to publish the words which were published. It would not be necessary to prove an actual intention to achieve any one of the objects specified.

In *Wallace-Johnson v. R.* [1940] AC 231, Counsel for the appellant (at p. 234)

> contended (a) that both in English common law and in the Criminal Code in question there must be some evidence of intention outside the mere words of the instrument before a seditious intention can be said to exist; and (b) that in the present case, when the document is read, there cannot be found in it any seditious intention at all; and therefore before the appellant can be convicted there must be some evidence of seditious intention extrinsically, and, there being none, this conviction cannot stand on any ground.

The Lord Chancellor in giving the judgment of the Privy Council said, at p. 240:

> 'Seditious words,' in the terms of sub-s. 8, 'are words expressive of a seditious intention'. By an earlier definition in the same sub-section, 'A seditious intention' is an intention to bring into hatred or contempt ... the Government of the Gold Coast as by law established.

He went on to say, at p. 241:

> The submission that there must be some extrinsic evidence of intention, outside the words themselves, before seditious intention can exist, must ... fail ... If the words are seditious by reason of their expression of a seditious intention as defined in the section, the seditious intention appears without any extrinsic evidence. The Legislature of the Colony might have defined 'seditious words' by reference to an intention proved by evidence of other words or overt acts. It is sufficient to say they have not done so.

Put in another way (and for this I cannot do better than to adopt the words in the **headnote**, at p. 231) - If the words complained of are themselves "expressive of a seditious intention" as defined in the section they are "seditious words". It is not necessary to produce any extrinsic evidence on intention, outside the words themselves, before seditious intention can exist. If the words are seditious by reason of their expression of a seditious intention as defined in the section the seditious intention appears without any extrinsic evidence.

The Sedition Act 1948

I have shown that the model for subsection 8 of s. 326 of the Criminal Code of the Gold Coast was Stephen's definition of sedition in Article 93 of the **Digest.** In *Wallace-Johnson* the Privy Council has laid down that incitement to violence is not a necessary ingredient of the crime of sedition under the Criminal Code of the Gold Coast. A *fortiori*, inciting others to public disorders is not a necessary ingredient of sedition.

In Stephen's definition and as well as the Criminal Code of the Gold Coast, a seditious intention is an essential ingredient, but Stephen in Article 94 of the **Digest** had expressed the view that intention is no more than the natural consequence of the words, and the Privy Council in *Wallace-Johnson* has held that it is not necessary to prove actual intention. It is enough if the words are seditious by reason of their expression of a seditious intention as defined in the section.

It looks as if it was with hindsight that the Sedition Act 1948 came to be drafted. If intention requires no more *mens rea* than an intention to publish the words which were published; if it is not necessary to prove actual intention because seditious words are words which are "expressive of a seditious intentions" as defined in the section, then the gravamen or an essential ingredient of sedition is not *mens rea* (intention) but an *actus reus*. That is, the words must have a tendency (a seditious tendency) to achieve one or more of the objects specified.

Therefore instead of beginning with the words "A seditious intention is an intention ...", our s. 3(1) starts off with:

> 3. (1) **A 'seditious tendency' is a tendency -**
>
> (emphasis supplied)
>
> (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;
>
> (b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State; or

(e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia; or

(f) **to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Arts. 152, 153 or 181 of the Federal Constitution.**

(2) Notwithstanding anything in sub-section (1) an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only it has a tendency -

(a) to show that any Ruler has been misled or mistaken in any of his measures;

(b) to point out errors or defects in any Government or constitution as by law established **(except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in para. (f) of sub-section (1) otherwise than in relation to the implementation of any provision relating thereto)** or in legislation or in the administration of justice with a view to the remedying of the errors or defects;

(c) **except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in para. (f) of sub-section (1) -**

(i) to persuade the subjects of any Rulers or the inhabitants of any territory governed by any Government to attempt to procure by lawful means the alteration of any matter in the territory of such Government as by law established; or

(ii) to point out, with a view to their removal, any matters producing or having a tendency to produce feelings of ill-will and enmity between different races or classes of the population of the Federation,

if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency.

(3) For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing shall be deemed to be irrelevant if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency.

The portions which I have highlighted in bold type did not appear in the original form of the section.

Seditious tendency

Although it is unnecessary to prove "intention": see s. 3(3) of the Act, it is necessary to prove that the words have a tendency to achieve one or more of the objects specified in s. 3(1) of the Act. In deciding whether the words have this tendency, it is proper (to borrow the words of Coleridge J in *R. v. Aldred* [1909] 22 Cox CC 1 at 3)

> ... to look at all the circumstances surrounding the publication with the view of seeing whether the language used is calculated to produce the results imputed; that is to say, you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of professors or divines, might produce a different result if used before an excited audience of young and uneducated men.

On the other hand (to use the language of Cave J in *R. v. Burns* [1886] 16 Cox CC 355, at 365)

> A man cannot escape from the consequences of uttering words with a [seditious tendency] solely because the persons to whom they are addressed may be too wise or too temperate to be seduced [by those words].

Therefore words are seditious (1) if they are likely to incite or influence the audience actually addressed or (2) if they are likely to incite or influence ordinary people even though the audience addressed was unaffected by the words.

What is not seditious

Stephen in Article 93 of the **Digest** gave the definition of what is not seditious. Almost identical provisions are to be found in the Criminal Code of the Gold Coast. With regard to the Gold Coast provisions, this is what the Privy Council said in *Wallace-Johnson,* at p. 240:

> Question will necessarily arise in every case, as in this case, as to the facts to which it is sought to apply these definitions. Fine distinctions may have to be drawn between facts which justify the conclusion that the intention of the person charged was to 'bring into hatred or contempt ... the Government of the Gold Coast,' and facts which are consistent only with the view that the intention was no more than, in the words of a later part of sub-s. 8, 'to point out errors or defects in the Government ... of the Gold Coast.'

In our Sedition Act, we have s. 3(2). The subsection specifies the circumstances or situations which are not seditious. Fine distinctions may have to be drawn between facts which justify the conclusion that there was a tendency to achieve one or more of the objects specified in s. 3(1), and facts which are consistent only with the view that the tendency was no more than to do the acts or things mentioned in s. 3(2). Provided that in doing any of the acts or things mentioned in s. 3(2), the words used do not have the effect of achieving any of the objects specified in s. 3(1).

There is a similar provision to our s. 3(2) in the Criminal Code of the Gold Coast: see the proviso to subsection 8 of s. 326 of the Gold Coast Code.

Freedom of speech

Of course we must not overlook the importance of freedom of speech. The relevant parts of Article 10 of the Federal Constitution reads:

10. (1) Subject to Clause (2), (3) and (4) -

(a) every citizen has the right to freedom of speech and expression;

(b) ...

(c) ...

(2) Parliament may by law impose -

(a) on the rights conferred by para. (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.

(b) ...

(c) ...

(3) ...

(4) in imposing restrictions in the interest of security of the Federation or any part thereof or public order under Clause 2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

From the above provision, it is clear that subject to Clause (2) and (4) of Article 10, every citizen has the right to freedom of speech and expression. For the purposes of the present case only the following part of Clause (2)(a) is relevant, which is that Parliament may impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order. By virtue of Article 4(2)(b) the validity of any law which Parliament under Article 10(2)(a) has deemed necessary or expedient to pass to impose restrictions on freedom of speech shall not be questioned.

Although the Sedition Act 1948 came into force before Merdeka Day, under Article 162(1) it continues to be still in force: see *Assa Singh v. Mentri Besar, Johore* [1969] 2 MLJ 30.

Raja Aziz has argued that inciting others to public disorders is an essential ingredient of the crime because of the words "in the interest of ... public order" in Article 10(2)(a) of the Constitution. Public disorders may well be, and no doubt often is, the result of wild and ill-considered words, but there is no requirement in the constitutional provision that the law made under it must be aimed at an intention to produce that result. As here, s. 3(1) of the Sedition Act does not require proof from the words themselves of any intention to produce such a result. Those words which would be necessary to support the argument of the defence need not be imported into s. 3(1) of the Sedition Act.

Prima facie case

I am satisfied that the prosecution has, in the present case, discharged their evidential burden by adducing evidence of primary facts. At this point, I keep an open mind about various aspects of the case, in particular, with regard to whether or not a seditious tendency has been proved, and whether the words were in fact published in the spirit of the matters referred to in s. 3(2) of the Act in that those words by themselves did not bear a seditious tendency. It is my duty at this stage to suspend judgment on them until all the evidence that either party wished to put before the Court had been presented and Counsel on both sides have addressed to me such arguments and comments on the evidence as they may wish to advance. Then only would I direct my mind to the question whether the guilt of the accused had been proved beyond reasonable doubt.

I therefore call upon Mr. Cumaraswamy to enter on his defence.

2ND JUDGMENT

NH Chan J:

Freedom under the law

Raja Aziz, fair minded lawyer that he is, has submitted with customary candour that "It is an irrefutable fact that the Sedition Act imposes restrictions on the right to freedom of speech and expression". He recognised that "the right to free speech and expression is not an absolute right. Nobody can deny that there must be certain restriction."

Professor Harry Street (F*reedom, The Individual and the Law* (5th Edn.) p.12) has this to say:

> This is how English law goes about its job of defining limits on our freedom. The citizen may do as he likes unless he clashes with some specific restriction on his freedom. The law does not say: 'You can do that'; it says 'You cannot do this', which means that you can do everything else except that which it says you cannot do. Whenever such a prohibition is made, the reason will be that some other interest is rated more important than that freedom on which it impinges.

On personal freedom, Lord Denning (*Freedom under the Law (the Hamlyn Lectures, first series)* p. 4) put it thus:

> The freedom of the individual, which is so dear to us, has to be balanced with his duty; for, to be sure every one owes a duty to the society of which he forms part.

(p. 5):

> By personal freedom I mean the freedom of every law-abiding citizen to think what he will, and to go where he will on his lawful occasions without let or hindrance from any other persons. ...It must be matched, of course, with social security, by which I mean the peace and good order of the community in which we live. The freedom of the just man is worth little to him if he can be preyed upon by the murderer or thief. Every society must have the means to protect itself from murderers. It must have powers to arrest, to search, and to imprison those who break the laws.

His second lecture was on freedom of mind and conscience. This is how he put it (pp. 35, 36):

> In the last lecture I was concerned with personal freedom ... Now I come to the freedom of his mind and of his conscience. This is just as important, if not more important, than his personal freedom. To our way of thinking it is elementary that each man should be able to inquire and seek after the truth until he has found it. We hold that no man has any right to dictate to another what religion he shall believe, what philosophy he shall hold, what shall be his politics or what view of history he shall accept. Every one in the land should be free to think his own thoughts - to have his own opinions, and to give voice to them, in public or in private ... and free also to criticise the Government or any party or group of people ...
>
> Although this principle seems obvious to us it is on occasions prone to bring the individual into conflict with the State, or rather with the people who are in power in the State. This country, just as every country, preserves to itself the right to prevent the expression of views which are subversive of the existing constitution or a danger to the fabric of society.

Professor Harry Street sums up thus (*ibid*, p. 312):

> The jurisprudential notion of liberty is the same, whether we have the Dicey Rule of Law or a Bill of Rights. For example, freedom of speech can never be a positive power to do something. Every legal system prescribes that you cannot do this and this: you must not defame another, you must not be seditious, you must not be obscene, and so on.
>
> The legal concept of liberty is that there are residual areas of great importance where man is free to act as he likes without being regulated by law.

In this country, just as in every country, there cannot be absolute freedom when we speak of fundamental rights (or human rights). In all common law countries, whether we have the Dicey Rule of Law or a Bill of Rights (as in the United States) or a written constitution, freedom is not an absolute right. Lord Denning calls it: freedom under the law. This telling phrase was coined by him in 1949; he was 'the first and true inventor' of it: see *The Family Story* pp. 177-8.

Free speech and the constitutional provisions

Raja Aziz in his submission did not say that the Sedition Act is unconstitutional. He did not say that. In fact what he did was to urge this Court not to ignore or disregard the constitutional provisions concerning freedom of speech and expression. He said that this Court will be committing an error if it were to consider the Sedition Act in isolation. But he did rely on *Kedar Nath v. State of Bihar* [1962] AIR SC 955 which held that if "by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government" makes the offence of sedition under s. 124A of the Indian Penal Code, then the section would be "unconstitutional in view of Article 19(1)(a) read with Clause (2)" of the Indian Constitution. But it would not be unconstitutional if it could be read into the words of the section a "tendency to disorder or intention to create disturbance of law and order". This is how Sinha CJ put it, at pp. 968-969:

> (26) .... Any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity. If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Article 19(1)(a) read with Clause (2).

Why did Sinha CJ import into the statutory offence of sedition in s. 124A the further qualification that there must be a "tendency to disorder or intention to create disturbance of law and order"? Should the Judge read into the section words which are not there? He tried to explain it in this passage, at p. 968:

> (25) ...it is pertinent to observe that the security of the State which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with a view to punishing offences against the State, is undertaken ... This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. But the freedom has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, **in words which incite violence or have the tendency to create public disorder."** (The emphasis supplied)

Article 19(2) of the Indian Constitution allows the State to impose reasonable restrictions on freedom of speech in the interest of, *inter alia*, security of the State or public order. In *Ramji Lal Modi v. State of UP* [1957] SCR 860; [1957] AIR SC 620, the validity of s. 295A of the Indian Penal Code was challenged on the ground that it imposed restrictions on the fundamental right of freedom of speech and expression beyond the limits prescribed by Clause (2) of Article 19 of the Constitution. In that case, the Court observed:

> The question for our consideration is whether the impugned section can be properly said to be a law imposing reasonable restrictions on the exercise of the fundamental rights to freedom of speech and expression in the interests of public order. It will be noticed that the language employed in the amended clause is 'in the interest of' and not 'for the maintenance of'. As one of us pointed out in *Debi Saran v. The State of Bihar* [1954] AIR Pat 254 the expression 'in the interests of' makes the ambit of the protection very wide. A law may not have been designed to directly maintain public order and yet it may have been enacted in the interests of public order'.

From the passage which I have just read, we can clearly see that the constitutional provisons allow the State to impose restrictions **in the interest of** public order which has a wider ambit than **for the maintenance of** public order. This is because a law may not have been designed to maintain public order and yet it may have been enacted in the interest of public order.

Similarly, a law may not have been designed to prevent incitement to violence and yet it may have been enacted in the interest of security. Put in another way, a law would still be in the interest of security or public order without having to make it a law for the prevention of violence or public disorder. Therefore, in my view, Sinha CJ was quite wrong when he said:

> The freedom has to be guarded against becoming a licence for vilification and condemnation of the government established by law, **in words which incite violence or have the tendency to create public disorder.**

Therefore s. 124A of the Indian Penal Code is not beyond or outside the legislative power of Article 19(2) of the Indian Constitution because it is a law made in the interest of security and public order. There is no requirement in Article 19(2) of the Indian Constitution for the law to be made for the prevention of violence or public disorder before it can be said to be within the scope and power of Clause (2) of Article 19. Section 124A clearly is within the limits of constitutional legislative power and there is no necessity to import the additional qualification desired by Sinha CJ.

But then Sinha CJ went on to say (p. 968):

> (25) ... The Court has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Article 19(1)(a) of the Constitution and the power of the legislature to impose reasonable restrictions on that guaranteed right in the interest of, *inter alia*, security of the State and public order. We have, therefore, to determine how far the ss. 124A and 505 of the Indian Penal Code could be said to be within the justifiable limits of legislation. If it is held, in consonance with the views expressed by the Federal Court in the case of [1942] FCR 38: ([1942] AIR FC 22) that the gist of the offence of 'sedition' is incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State, in other words bringing the law into line with the law of sedition in England, as was the intention of the legislators when they introduced s. 124A into the Indian Penal Code in 1870 as aforesaid, the law will be within the permissible limits laid down in Clause (2) of the Article 19 of the Constitution. If on the other hand we give a literal meaning to the words of the section, divorced from all the antecedent background in which the law of sedition has grown, as laid down in the several decisions of the Judicial Committee of the Privy Council, it will be true to say that the section is not only within [sic] but also very much beyond the limits laid down in Clause (2) aforesaid.

As declared by the Judge, he was in actual fact bringing the Indian law into line with the common law of sedition in England. This, according to him, was intended by the legislators when they introduced s. 124A into the Indian Penal Code in 1870. The question is, was he right in so doing? Did the Judge really know the intention of the legislators?

Sinha CJ, had in fact pointed out that s. 124A was not placed on the statute book until 1870 and that it was Sir James Stephen who had introduced it. This is what he said, at p. 960:

> Section 124A was not placed on the Statute Book until 1870, by Act XXVII of 1870. There was a considerable amount of discussion at the time the amendment was introduced by Sir James Stephen but what he said while introducing the bill in the legislature may not be relevant for our present purposes. The section as then enacted ran as follows:
>
> 124A. Exciting Disaffection

> Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to excite, feelings and disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.
>
> Explanation - Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the methods of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause.'

Sir James Stephen, you will remember, was the Judge whose definition of sedition appeared as Article 93 of the Digest of the Criminal Law. In fact s. 124.A which Sinha CJ had reproduced in the passage which I have just read was the work of Stephen J. Nowhere in s. 124.A of the Indian Penal Code did Sir James Stephen include the further qualification of incitement to violence or inciting others to public disorders as an ingredient of the offence. As I have said earlier (see my decision when I called on Mr. Cumaraswamy to enter on his defence), "Although it may appear to be the position in English case law that incitement to violence or inciting others to public disorders is an essential ingredient of sedition, it is not so in a criminal code has as its model Stephen's definition."

Sir James Stephen was the author of s. 124.A of the Indian Penal Code. He did not in drafting that section make incitement to violence or the tendency or the intention to create public disorders the gist of the offence of sedition. Nor did he make them the gist of the crime in his definition in Article 93 of the Digest. And Article 93 of the Digest was used as the model for the crime of sedition in the Criminal Code of the Gold Coast. So that when we look at s. 124.A of the Indian Penal Code or at the Criminal Code of the Gold Coast on sedition or our own Sedition Act (which I have previously said was modelled on Stephen's definition), we are merely looking at the definition of sedition as apprehended by Sir James Stephen, and not at English case law *For incitement to violence see R. v. Collins [1839] 3 St. Tr. (NS) 1149; R. v. Lovett [1839] 3 St. Tr. (NS) 1177; R. v. Jones [1848] 6 St. Tr. (NS) 783; R. v. Aldred [1909] 22 Cox 1. For conduct which tends to public disorder, see: R. v. Burdett [1820] 1 St. Tr. (NS) 1; R. v. Collins, ante; R. v. Aldred, ante, R. v. Caunt [1947] reported in* ***An Editor on Trial*** *(Morecambe Press Ltd.) and noted in 64 LQR 203.* which had developed separately from Stephen's definition. Stephen's definition has been codified as the law of the Gold Coast and of this country. And *Wallace-Johnson v. The King* [1940] AC 231 has laid down that since the law is contained in a code, [here I must borrow the words of Raja Aziz] "the Court must look for the ingredients of the offence from the codified law and not import principles which have been established by English case law, and that, accordingly there cannot be imported into the offence (as created under the codified law) the additional ingredient of incitement to violence or inciting others to public disorder."

The view expressed by **Sinha CJ** in the Indian Supreme Court in *Kedar Nath* cannot by any means be supported. In my judgment, the correct view is that as laid down by the Privy Council in *Wallace-Johnson.*

Free Speech and Sedition - who is to draw the line

Lord Denning (Freedom under the Law, p. 36) has said that "the line where criticism ends and sedition begins is capable of infinite variations. This is when the practical genius of the common law shows itself. The line between criticism and sedition is drawn by a jury who

a are independent of the party in power in the State". **Lord Kenyon** has quaintly said, "a man may publish whatever a jury of his countrymen think is not blamable." The quotation is taken from the speech of Fitzgerald J in *R. v. Sullivan* [1868], 11 Cox's CC 44, 50.

(At p. 39) **Lord Denning** gave an example where the value of a jury is most clearly seen. He referred to the celebrated case of *John Miller* [1770] 20 State Trials 869 who had printed in his paper **The London Evening Post** an open letter addressed to King George III by Junius. b The government could not identify Junius, and so it prosecuted Miller, the printer, for seditious libel in 1770. To quote **Lord Denning** (pp. 39, 40) - "**Lord Mansfield** directed the jury that the question of libel or no libel was a matter of law for the Judge, and that the jury was only to decide whether the paper was printed and published. In as much as the paper was obviously printed and published, that direction was in effect a direction to the jury to find Miller guilty. But the jury stood out even against that great Judge." The jury ignored c what was virtually a direction to convict and found Miller Not Guilty. In 1971, Charles Fox proposed a Bill which was seconded by Erskine in the House of Commons which became the Libel Act 1792. The Act says that it was the jury, not the Judge, who has finally to decide on whether a libel was seditious. "A jury may always give a general verdict of guilty or not guilty: and no judge can take away that right from them. Paliament has so declared it." - said **Lord Denning** (at p. 40). d

In this country, we do not have a jury for the trial of sedition cases. Nor do we have Fox's Libel Act. But we do have independent Judges. The line between criticism and sedition is drawn by a Judge who is independent of the party in power in the State. Who can say which is better - jury or independent Judge?

This is what **Lord Denning** said about the independence of the Judges as being the keystone e of the rule of law (see *The Family Story*, at pp. 191-192)

> The keystone of the rule of law in England has been the independence of the Judges. It is the only respect in which we make any real separation of powers. There is here no rigid separation between the legislative and the executive powers, because the ministers, who exercise the executive power, also direct a great deal of the legislative power of Parliament. But the judicial power is truly separate. The Judges for nearly 300 years have been absolutely f independent. And when I speak of Judges, I include not only the High Court Judges, but also all the Magistrates and others who exercise judicial functions. No member of the government, no member of Parliament, and no official of any government department, has any right whatever to direct or to influence or to interfere with the decisions of any of the Judges. It is the sure knowledge of this that gives the people their confidence in the judges, and I would add also the chairman of tribunals when they are independent of the executive, for then they too are g judges. It does not depend on the name Judge or Chairman but on the substance. The critical test which they must pass if they are to receive the confidence of the people is that they must be independent of the executive.

These are fine sentiments and I think they are of universal application to all Judges of the common law. They are as much applicable here. If Judges are to receive the confidence of the people they must be independent of the executive.

h In the Australian case of *Burns v. Ransley* [1949] 79 CLR 101 there was no jury nor was there Fox's Libel Act. The case was heard by a stipendiary Magistrate. It came before the High Court of Australia upon a case stated by Mr. Stanley Wilson, Chief Stipendiary Magistrate, Brisbane. In that case, an Australian communist said that "in a war with the Soviet Union, the Australian communists would fight on the side of the Soviet Union." or i words to the like effect. It was held that the words were seditious.

Latham CJ said, at p. 108:

> It is not necessary in the present case to consider the common law as to sedition. The appellant was charged with an offence against the statute - uttering seditious words - s. 24D. Section 24B provides that seditious words are words expressive of a seditious intention, and the case for the prosecution depends upon whether or not the words proved to have been uttered expressed the intention described in pars. (b) or (d) of s.24A(1) (see *Wallace-Johnson v. The King* [1940] AC 231).

"That case was very much on the border line, as was shown by the fact that the High Court of Australia was evenly divided on the point." - said **Lord Denning** (*Freedom under the Law*, pp. 44, 45). Just as in *Burns v. Ransley*, in the present case the line between what is seditious and what is not seditious is drawn by a Judge. In the United Kingdom, it is drawn by a jury. If the Judges are independent, as they are in Australia and in this country, then there is nothing to fear - the rule of law is preserved. It is then the province of the Judge to hold the balance between the competing interests.

The Sedition Act - section 3(2)

I have earlier when giving my decision for calling on Mr. Cumaraswamy to make his defence expressed my view on the meaning of s. 3(2) of the Sedition Act. At this point, it is convenient to return to the words which I have used:

> The subsection specifies the circumstances or situations which were are not seditious. Fine distinctions may have to be drawn between facts which justify the conclusion that there was a tendency to achieve one or more of the objects specified in s. 3(1), and facts which are consistent only with the view that the tendency was no more than to do the acts or things mentioned in s. 3(2). Provided that in doing any of the acts or things mentioned in s. 3(2), the words used do not have the effect of achieving any of the objects specified in s. 3(1).

I stand by what I have said. But for the sake of clarity I shall restate my view on the subsection in another way. The words which seem to be giving difficulty to Raja Aziz are:

> 3(2) Notwithstanding anything in sub-section (1) an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency-
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency.

Put in another way it means this.

> Although it is seditious to utter words which have one or more of the tendencies stated in s. 3(1), nevertheless words are not to be treated as seditious solely because they have a tendency which is no more than to do the acts or things mentioned in s. 3(2), provided that the words used are not seditious in other ways.

The facts

The facts are not in dispute. Mr. Cumaraswamy is charged for having uttered seditious words at a press conference called by him on 24 July 1985 at the office of the Selangor and Federal Territory Bar Committee, Old High Court Building, Kuala Lumpur.

The statement reads:

> This is an open appeal to the Pardons Board by the Bar Council to reconsider the Petition of Sim Kie Chon for commutation of his death sentence.
>
> Sim lost all his avenues through the Courts. While the Courts cannot review his case the Pardons Board can. **What is disturbing and will be a source of concern to the people is the manner in which the Pardons Boards exercises its prerogative.** Though the prerogative of pardon is not justifiable before the Courts yet surely it cannot be absolute under a system of government committed to justice and the Rule of Law. Even prerogatives must be exercised with some uniform, if not principles, guidelines.
>
> In the case of Mokhtar Hashim he was found guilty of discharging a firearm and killing another. Further, his trial was treated like a security case and tried under the Essential Security Cases Regulations 1975. No doubt he had a licence for his firearm. In Sim's case he was charged for merely in possession of a firearm. He had no licence. He was tried for an offence under the Internal Security Act which carries the mandatory death sentence. There was no evidence on record before the Court that he was involved in any subversion or organised violence for which the Internal Security Act was enacted to prevent and suppress. Hence Sim should never have been charged under the Internal Security Act. On the strength of the evidence before the Court if it was not for the legislative direction on the Court to pass the mandatory death sentence no Court, in the exercise of its discretion, would have sentenced him to death. This is a factor the Pardons Board could have taken into consideration.
>
> **On records before the Courts Sim's case certainly was less serious than Mokhtar Hashim's case yet the latter's sentence was commuted. The people should not be made to feel that in our society today the severity of the law is meant only for the poor, the meek and the unfortunate whereas the rich, the powerful and the influential can somehow seek to avoid the same severity.**
>
> I therefore appeal to the Pardons Board to review Sim's Petition on humanitarian grounds and in the name of justice and good conscience and commute his sentence." (the prosecution has supplied the emphasis)

At the press conference many reporters were present. Mr. Cumaraswamy at first read out the statement to them. After that he distributed copies of the statement to all the reporters to all the reporters present. The next morning the story was carried by the local press. There is no dispute as to what has transpired. Mr. Cumaraswamy admits that he had called the press conference, that he distributed the statement to the local press, and that the story was carried in the newspapers the next day. It is plain that he did that deliberately and knowing that the statement made by him would reach a wide section of the public. He had hoped that by the action the Pardons Board would consider his appeal and which would eventually lead to the death sentence on Sim being commuted.

The prosecution called two members of the press. There were Miss Lakshmi Natarajan of the New Straits Times and Miss Chiew Mui Kheng of the Nanyang Siang Pau, a Chinese newspaper. They produced to the Court the article which appeared in their respective newspapers on 25 July 1985. Miss Chiew also said that other reporters who were present at the press conference were from The Star (English), Shin Min (Chinese), Thung Pau (Chinese) and Sin Chew (Chinese).

The defence

Mr. Cumaraswamy was called to the English Bar on 22 October 1966. He is a practising member of the Malayan Bar since 1967; he being admitted as an advocate and solicitor on 10 October 1967. He is presently the Vice President of the Bar Council, Malaya and a Chairman of the Human Rights Sub Committee of the Bar Council, Lawasia. The reason for calling the

press conference and making the statement, according to him, was to bring to the notice of the Pardons Board his open appeal to the Board to review their previous advice in the hope that the Board would recommend the death sentence on Sim Kie Chon to be commuted to life imprisonment. He said that in his open appeal to the Board he was urging the Board to exercise their powers fairly and uniformly so that the people would not be made to feel that the Board were discriminating. He said that that was all that was intended in the appeal.

The verdict

To be seditious the words uttered must have a tendency to achieve one or more of the objects specified in s. 3(1).

Section 3(1)(d): The question is, did the words uttered by Mr. Cumaraswamy have a tendency-

> 3(1)(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State.

According to the paragraph, words which are capable of raising either discontent or disaffection among the people are seditious.

"Disaffection": I shall start with "disaffection". Disaffection, in the context of sedition, does not mean the absence of affection and regard, it means disloyalty, enmity and hostility: see per Latham CJ in *Burns v. Ransley* at p. 109. See also Dixon J in the same case, at p. 115:

> Disaffection is a traditional expression but it is not very precise. It means an estrangement upon the part of the subject in his allegiance which has not necessarily gone as far as an overt act of a treasonable nature or an overt breach of duty. It supposes that the loyalty and attachment to Authority, upon which obedience may be considered to depend, is replaced by an antagonism, enmity and disloyalty tending to make government insecure.

I can say at once that the statement did not have the tendency to incite or to raise disaffection among the people. In my judgment, the statement did not contain words which were capable of advocating or encouraging the people to disloyalty. There was no tendency in the words which could create antagonism, enmity and disloyalty among the people to make the government insecure.

"Discontent": I turn now to the word "discontent". Discontent means dissatisfaction. Fitzgerald J. said in *R. v. Sullivan* [1868] 11, Cox C.C. 44 at p. 49:

> Every man is free to write as he thinks fit, but he is responsible to the law for what he writes; he is not, under the pretense of freedom, to invade the rights of the community, or to violate the constitution, or to promote insurrection, or endanger the public peace, or **create discontent,** or bring justice into contempt, or embarrass its functions. (emphasis supplied)

And at pp. 56, 57, the Judge said:

> I concur with the Counsel for the defendant that, if the law of [seditious] libel was carried out in the full strictness of its letter, it would materially interfere with the freedom of the press. Hence a great deal depends upon the forbearance of Government, the discretion of Judges, and, above all, on the protection of juries. For instance, it is open to the community and to the press to complain of a grievance. Well, the mere assertion of a grievance tends to create a discontent, which, in a sense, may be said to be seditious. But no jury, if a real grievance was put forward, and its redress *bona fide* sought, although the language used might be objected to - no jury would find that to be a seditious libel. It might be the province of the press to call attention to the weakness or imbecility of a Government when it was done for the public good. How closely that trenches on the law of sedition; and yet such writing, when *bona fide*, would receive protection from a jury.

But there is no jury to try sedition cases in this country. It could be said that an English jury could feel it in their bones if an assertion of a grievance or complaint which tends to create a discontent is seditious or not. Also, they do not have to give reasons for their verdict. But a Judge does not enjoy this luxury. A Judge, on the other hand, has to give reasons for his decision. He has to say why he thinks a speech has a tendency to raise discontent among the people. If he did not think so, he has still to say why he thinks the speech did not have the tendency to raise discontent. Put in another way, the Judge has to ask himself whether or not he is satisfied that the speech was likely to create discontent or dissatisfaction among the people.

Mr. Cumaraswamy says that his statement was an open appeal to the Pardons Board urging them to exercise their powers uniformly so that the people would not be made to feel that the Board were discriminatory. I quote from the statement:

> This is an open appeal to the Pardons Board by the Bar Council to reconsider the Petition of Sim Kie Chon for commutation of his death sentence.
>
> Sim lost all his avenues through the Courts. While the Courts cannot review his case the Pardons Board can. What is disturbing and will be a source of concern to the people is the manner in which the Pardons Board exercises its prerogative ... Even prerogatives must be exercised with some uniform, if not principles, guidelines.
>
> On records before the Courts Sim's case certainly was less serious than Mokhtar Hashim's case yet the latter's sentence was commuted. The people should not be made to feel that in our society today severity of the law is meant only for the poor, the meek and the unfortunate whereas the rich, the powerful and the influential can somehow seek to avoid the same severity.

Would those words be likely to create discontent or dissatisfaction among the people? This is how Fitzgerald J asked of the jury in *Sullivan* at p. 53:

> Without defining sedition further than for the purposes of this trial, I have to tell you if you, in your honest judgment, come to the conclusion that these publications, or any of them, are calculated and intended to ... create dissatisfaction, ... then they are seditious libels. I do not think I can put the matter plainer than that.

Where there is no jury, a Judge has to ask himself if it is in his honest judgment that the statement was likely to create dissatisfaction among the people. If it is likely to do that then the statement is seditious. If in his honest judgment he does not think that the words were likely to create dissatisfaction among the people, then he has to find that the words are not seditious. In my judgment I do not think that words which were used to point out to the Pardons Board that the people should not be made to feel that the Board was discriminating between Mokhtar Hashim and Sim Kie Chon are words which were likely to create discontent or dissatisfaction among the people.

Further, the statement was not likely to create such sentiments against Authority - a requirement which I feel is implicit in the definition of the words "discontent" and "disaffection". "Disaffection" means disloyalty, enemity and hostility against Authority. In the same way, "discontent" means dissatisfaction against Authority. Therefore, "to raise discontent or disaffection" among the people means to create discontent or disaffection among the people against Authority. Consequently, the assertion of a grievance or complaint which tends to create discontent must be directed at Authority for it to be seditious.

I do not think it can be said that the statement was likely to create discontent among the people against Authority. In my judgment, I do not think that there was such a feeling against Authority among the people. "Authority" is this regard means the Yang di-Pertuan Agong,

the Rulers, the Government and the administration of justice. For instance, it is not sedition to incite or raise discontent or dissatisfaction among the people at the Tan Sri Ahmad Noordin Committee of Inquiry over their Report on the B.M.F. loan scandal, or at the Singapore Government over the arrest of Mr. Tan Koon Swan, the president of the M.C.A., or at the decision of the referee in the football match.

Section 3(1)(e): But then would statement be likely to promote feelings of ill-will and hostility between different classes of the population of Malaysia (paragraph (e) of section 3(1) of the Sedition Act)? I quote from the statement:

> On records before the Courts Sim's case certainly was less serious than Mokhtar Hashim's case yet the latter's sentence was commuted. The people should not be made to feel that in our society today the severity of the law is meant only for the poor, the meek and the unfortunate whereas the rich, the powerful and the influential can somehow seek to avoid the same severity.

In that passage Mr. Cumaraswamy was pointing out to the Pardons Board that the people should not be made to feel that the Board was discriminating between "the poor, the meek and the unfortunate" and the "the rich, the powerful and the influential". Mr. Cumaraswamy was certainly not trying to promote ill-will and hostility between the different classes of the population. In fact, he was urging the Pardons Board not to create the feeling or impression among the population that the Board was discriminating between the different classes.

In *Reg v. Burns* [1886] 16, Cox CC 355, the headnote says:

> An intention to excite ill-will between different classes of Her Majesty's subjects may be a seditious intention; whether or not it is so in any particular case, must be decided upon by the jury after taking into consideration all the circumstances of the case.

Where there is no jury, as here, the question whether or not there is a tendency to promote ill-will and hostility between different classes of the population in any particular case must be decided by a Judge who is to take into consideration all the circumstances of the case. After taking all the circumstances of the instant case into consideration, I am clearly of the opinion that the statement did not have the tendency to promote ill-will and hostility between the different classes of the population.

Section 3(1)(a): And finally the prosecution has placed reliance on paragraph (a) of s. 3(1) of the Act. It says:

> 3 (1) A 'seditious tendency' is a tendency -
>
> (a) to bring into the hatred or contempt or to excite disaffection against any Ruler of against any Government

Both **Mokhtar Hashim** and **Sim Kie Chon** are ESCAR cases. By reading reg. 29(1) of the Essential (Security Cases) (Amendment) Regulations 1975 and reg. 2 of the Essential (Security Cases) (Amendment) Regulations 1981 together, the Yang di-Pertuan Agong when exercising the power to grant pardons, reprieves and respites or to remit, suspend or to commute sentences under Clause (1) and (2) of the Article 42 of the Constitution shall act on the advice of the Pardons Board.

Raja Aziz has said that the Yang di-Pertuan Agong is obliged to accept the advice of the Pardons Board. He argues that since the Yang di-Pertuan Agong is bound by the advice of the Pardons Board, the Board is, therefore, subject to the supervisory jurisdiction of the Courts. He relied on *Maru Ram v. Union of India* [1980] AIR SC 2147; *Tonkin v. Brand*

[1960] WA Rep 535; *FAI Insurance Ltd. v. Winneke* [1982] 56 ALJR 388; *Teh Cheng Poh v. PP* [1970] 1 MLJ 50; and *OSK v. Tengku Noone* [1983] CLJ (Rep) 317. I agree with the submission to the extent that as the Board is not the king and since its function is only advisory the prerogative is not exercised by the Board.

Mr. Cumaraswamy's appeal was directed at the Pardons Board, not at the Ruler which in the instant case is the Yang di-Pertuan Agong. Therefore there can be no question of the statement having a tendency to bring into hatred or contempt or to excite disaffection against the Yang di-Pertuan Agong.

I find Mr. Cumaraswamy Not Guilty. I acquit and discharge him.

Also found at [1986] 1 CLJ 101